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SUPREME COURT, U. S.

No. 565

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

MONROE AUTO EQUIPMENT COMPANY,
a Michigan corporation,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITIONER'S REPLY TO BRIEF FOR FEDERAL TRADE COMMISSION IN OPPOSITION.

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The Scheffer Press, Inc.—ANdover 3-6850

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A Question of Law Is Presented Here.

In its Brief in Opposition, the Federal Trade Commission has persisted in the misunderstanding and misconstruction of the issues in which both it and the Seventh Circuit indulged in earlier stages of this matter.

The first of these is a confusion of matters of fact with matters of law. This is initially apparent in the "Questions Presented" section of the Brief (page 2), which states in part that one question is "whether there was *substantial evidence* to support the Commission's findings (a) that petitioner discriminated in price in granting affiliated

warehouse distributor-jobber purchasers the 20% warehouse distributor discount on products which they purchased for resale at the jobbing level, while competing independent jobbers were required to purchase at prevailing jobber prices; * * *."

Whether so designed or not, this statement might give this Court the impression that it is being asked to review a mere matter of the "weight of the evidence," when such is not the case. It was never disputed that all jobbers (affiliated or not) paid the same price, that all warehouse distributors paid the same price, and that warehouse distributors were allowed a 20% discount on their resales to all jobbers, including those under various degrees of common ownership with the warehouse distributors. On this point, there is no question of "substantial evidence" involved. The question is whether the 20% discount, under these circumstances, is a price discrimination cognizable under the Robinson-Patman Act. This is a question of law, not of fact. Even assuming for the sake of argument that the evidence established that some economic benefit was bestowed upon a few jobbers as the result of common ownership with a warehouse distributor, there remains unanswered the question of whether such an economic benefit, *in the legal contemplation of the statute,* is equivalent to the prohibited discrimination in price.

This is the legal question involved, and it is one which the Commission refuses to recognize. In this connection, it has closed its eyes to the only two relevant cases—*Nuarc Company* v. *Federal Trade Commission,* 315 F2d 576, 582 (7th Circuit, 1963) and *Central Retailer-Owned Grocers, Inc.* v. *Federal Trade Commission,* 319 F2d 410, 415 (7th Circuit, 1964), discussed at pages 9-10 of our Petition.

There Is No "Economic Benefit".

Additionally, the petitioner contends that the record does not support a finding that there was in fact any "economic benefit" (Pet'n. page 13). The Commission's statement of the supposed benefit (Brief, page 11) is entirely imaginary, and has no support in the record.

The Commission's Analysis of The Law Is In Error.

The Commission's statement (Brief, Page 7) that the "law is clear" is entirely unwarranted. That its citation of *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 475 is inapposite has been demonstrated in our Petition (page 8). Its reliance on the cases cited in its footnote 5 on page 8 is equally misplaced, since those cases involved entirely different situations. We discussed and distinguished *E. Edelmann & Co.* v. *Federal Trade Commission,* 239 F2d 152 (7th Circuit, 1956), *cert. den.* 355 U.S. 941 at page 11 of our Petition. In *Firestone Tire & Rubber Co.*, 55 F.T.C. 1759, the "warehouse distributor" was a jobber merely using a warehouse trade name to induce discounts. And in *Sherwin-Williams Co., et al,* 36 F.T.C. 25, the Commission dismissed the part of the complaint most relevant to the present situation.

Paragraph 17 of the Sherwin-Williams Complaint charged that Lucas & Co. sold paint to Union Hardware Co., Atlantic Distributing Co., and American Hardware Supply Co. at wholesale prices; that persons having financial interests in or control of these wholesale distributing companies also had financial control of retail hardware and paint stores (either as proprietor, partner, or stockholder). It was contended that the granting of the wholesale price to the distributors on paint resold to such financially related retailers was tantamount to granting

the wholesale price to such retailers. The Commission ordered that the charges set out in this Paragraph of the complaint be "dismissed without prejudice to the right of the Commission to proceed thereon in the future in any appropriate manner." (36 F.T.C. at page 75). Thus, it there refused to take a position on the question of whether sales may be made at wholesale prices to a distributing company for resale to financially affiliated retailers which is the very point involved in this appeal.

It is noteworthy that, in the case now before this Court, the Commission has not previously relied on the cases now cited in footnote 5; at least *Edelmann* is the only one it cited in the Seventh Circuit.

Finally, it is difficult to understand another of the Commission's citations—that of *American News Co.* v. *Federal Trade Commission,* 300 F2d 104 (2nd Circuit, 1962), *cert. den.* 371 U.S. 824,—as it is used on page 9 of its Brief. That case clearly demonstrated the proposition for which we cited it—that the indirect purchaser fiction should be resorted to *only* where its use is necessary to correct drastic situations (Pet'n. pp 10-11). *American News,* as the Circuit Court therein remarked, involved a "*classic example* of the *misuse* of the economic power possessed by large buyers." (300 F2d at 107).

Conclusion.

The Federal Trade Commission has failed to meet the points presented in our Petition, which demonstrated the necessity for this Court's reviewing the decision of the Seventh Circuit.

Respectfully submitted,

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